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No. 98-1161
In the

Supreme Court of the United States

October Term, 1999

THE CITY OF ERIE, et al.,

PETITIONERS

v.

PAP'S A.M.,

RESPONDENT

ON APPEAL FROM THE
SUPREME COURT OF PENNSYLVANIA

AMICI CURIAE BRIEF OF THE THOMAS JEFFERSON CENTER FOR PROTECTION OF FREE EXPRESSION, ALLEY THEATRE, ASSOCIATION OF PERFORMING ARTS PRESENTERS, KATHLEEN CHALFANT, DANCE/USA, TONY KUSHNER, THE LOOKINGGLASS THEATRE CO., TERRENCE MCNALLY, OREGON SHAKESPEARE COMPANY, YVONNE RAINER, RACHEL ROSENTHAL, THEATER ARTAUD, THEATRE COMMUNICATIONS GROUP, AND THE WALKER ART CENTER

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

The Thomas Jefferson Center for the Protection of Free Expression is a non-profit, non-partisan organization in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of freedom of speech and press form threats of different forms. The Center pursues that mission in several ways, notably by filing amicus curiae briefs in cases that raise important free expression issues.

Founded in 1947, the Alley Theatre of Houston, Texas, has established itself as one the country's leading professional resident theater companies, and was awarded the 1996 Tony award for Outstanding Regional Theater. The Alley's productions have been featured in over forty cities across the United States as well as in Paris and Venice. In 1999, three Alley productions ran simultaneously on Broadway, *Jekyll & Hyde*, *The Civil War*, and *Not About Nightingales*. The Alley has also produced works in collaboration with The Moving Theatre of London and the Royal National Theatre. The Alley has presented numerous works that included nudity, including its 1999 production of Tom Stoppard's *Travesties*, its 1996 staging of amicus curiae Terrence McNally's *Love! Valour! Compassion!* and its 1995 production of amicus curiae Tony Kushner's *Angels in America: Parts 1 and 2* (which the

[1]Written consent of all parties to the filing of this brief has been filed with the Clerk of Court as required by Supreme Court Rule 37. No party wrote any part of this brief or contributed to its financial support.

Alley presented at the Venice Biennale). Moreover, the Alley premiered Kushner's *Hydriotaphia* which included a character in a body suit that may be considered nudity under the Erie ordinance. The Alley has an interest in continuing to present acclaimed works that contain nudity including its production of Margaret Edson's *Wit*, a play discussed further herein, scheduled for this coming season.

The Association of Performing Arts Presenters is a national association of performing arts presenters, touring artists, and artists' managers. Founded in 1956, Arts Presenters has a membership of approximately 1500 organizations dedicated to bringing audiences and artists together. Thirty percent of its presenting organization members reside on university campuses and have long histories of dealing with freedom of expression and academic freedom issues. Arts Presenters seeks the inclusion of varied experiences in the belief that such pluralism leads to continued exploration and discovery which benefits both our membership and society. They welcome a broad cross-section of organizations and artists some of which have created and presented high quality dance and theater works that include nudity. In these performances, nudity is an aesthetic statement that adds to or reinforces the meaning of the work. This inclusive dynamic implies tolerance and respect for those with differing priorities and underscores the primacy of original thought. Arts Presenters commitment to freedom of expression flows directly from these deeply held convictions.

Kathleen Chalfant is an acclaimed stage actress who has worked widely on the New York stage. From 1997 to 1999, she appeared in the Off-Broadway production of Margaret Edson's *Wit*. In the play's final scene, described more fully herein, Ms. Chalfant appeared fully nude. For her performance, Ms. Chalfant won numerous Best Actress awards including the Obie, Drama Desk, Outer Critics Circle, Lucille Lortel, and Connecticut Critics awards. Ms. Chalfant also appeared on Broadway in amicus Kushner's *Angels in America* plays, each of which requires some nudity. Ms. Chalfant has an interest in continuing to perform in such productions and in ensuring that these Pulitzer Prize winning plays be performed as their authors intended.

Dance/USA is a national service organization whose purpose and mission is to advance the artform of dance. Founded in 1982, Dance/USA's membership currently includes over 250 ballet, modern, ethnic, jazz, culturally specific, traditional and tap companies, dance service organizations, presenters and individuals. Dance/USA's role is to speak as a united, national voice for the profession. Among Dance/USA's primary goals is to encourage greater knowledge, appreciation and support of the dance artform and to that end it provides forums for the discussion of significant artistic, administrative, governance, educational, audience and funding issues in dance. The members of Dance/USA share a fundamental belief that dance in all its great diversity is integral to all aspects of a healthy society and to the growth and development

of every individual. Dance/USA believes that a healthy society is one in which the many forms and expression in movement and dance are distinguished, understood and valued by all and that there is a basic right to self expression. In order to ensure the health of the dance field, Dance/USA seeks to encourage a lively exchange of performance and ideas, analysis and introspection, criticism and debate, and a free and open dialogue on dance. At times this expression, through the presentation of works of dance, includes the use of nudity. It is the organization's belief that those in the not-for-profit professional dance field utilize nudity from time to time within their creative work as an integral part of choreography when it is central to the content of the work being presented to the public.

Tony Kushner is a playwright best known for his seven-hour, two-part, Broadway production of *Angels in America: A Gay Fantasia on National Themes*, which received a Pulitzer Prize, two Tony Awards, two Drama Desk Awards, the Evening Standard Award, two Olivier Award Nominations, the New York Critics Circle Award, and the Los Angeles Drama Critics Circle Award. In late 1998 London's Royal National Theatre selected Angels in America as one of the ten best plays of the 20th century. Nudity plays an essential role in the plays, and has been included in productions around the country. His other plays include *Hydriotaphia, A Bright Room Called Day, Slavs!: Thinking About the Longstanding Problems of Virtue and Happiness*, and adaptations of Goethe's *Stella*, Brecht's *The Good Person of*

Setzuan, Ansky's *The Dybbuk*, and Corneille's *The Illusion*. In addition, Kushner has received grants from the New York State Council on the Arts, the NEA, the Whiting Foundation, and the American Academy of Arts and Letters.

The Lookingglass Theatre Company, based in Chicago, Illinois, was founded in 1988 by a group of graduates of Northwestern University. The company seeks to redefine the limits of theatrical experience and to make theater exhilarating, inspirational, and accessible to all. The company, which performs to approximately 25,000 patrons each year, has received 26 Joseph Jefferson citations for its works, and its works from the past season have been nominated for 12 more. Its ensemble includes actor David Schwimmer and playwright Mary Zimmerman, who has received a MacArthur fellowship for her work. The Lookingglass has in the recent past presented several works that contained nudity including Zimmerman's adaptation of Ovid's Metamorphoses (in which Cupid, consistent with classical depictions, appears fully nude), Zimmerman's S/M, David Kershar's The Naked King, and Bruce Norris's Vanishing Twin. The Lookingglass also runs a youth ensemble program.

Terrence McNally is one of the leading contemporary American playwrights. He has won four Tony and numerous other awards for his playwrighting. His play *Love! Valour! Compassion!* recently won the 1995 Tony, Drama Desk and Outer Critics Circle Awards for Best Play as well as the New York Drama Critics'

Circle Award for Best Play. The play, which is performed frequently in non-profit and commercial theaters throughout the country, requires the male actors to appear nude. Another play, *The Lisbon Traviata*, also requires nudity, and is widely performed. In addition, several productions of his play *Frankie and Johnny in the Claire de Lune* have contained nudity. Mr. McNally has an interest that his works may continue to be performed as written. McNally has received two Guggenheim Fellowships, a Rockefeller Grant, a Lucille Lortel Award and a citation from the American Academy of Arts and Letters. He has served as vice-president of the Dramatists Guild.

Established in 1935, the Oregon Shakespeare Festival is among the oldest and largest professional regional theater companies in the United States. In 1997, it reached a total audience of 364,602, the highest of any non-profit theater in the nation. OSF received the 1983 Tony Award for Outstanding Regional Theater and the 1983 national Governors' Association Award for distinguished service to the arts. Each season the Festival presents 11 works in three theaters in Ashland, Oregon, five by Shakespeare and six by classic and contemporary playwrights. The Festival has an interest in preserving its constitutional right to present works that include nudity. It has presented such works in the past including its 1997 production of David Edgar's *Pentecost*, its 1987 production of Sam Shepard's *Curse of the Starving Class*, and two productions of Shakespeare's *Measure for Measure*, one in 1986 and one in 1977.

Yvonne Rainer is a noted choreographer, performer and filmmaker who co-founded the highly influential Judson dance theater movement in the 1960s. This movement has proved to be a vital force in modern dance. Between 1962 and 1975 she presented her choreography throughout the United States and Europe, notably on Broadway in 1969, in Scandinavia, London, Germany, and Italy between 1964 and 1972, and at the Festival D'Auomne in Paris in 1972. In 1963 Rainer collaborated on a dance with the choreographer Steve Paxton to be performed at the Judson Memorial Church in New York. After much consideration the choreographers decided that the costuming would be nudity. The choreographers believed that in exposing the human body in a non-erotic context Rainer hoped to remove the social stigmas of repression, shame, and voyeuristic secrecy. Rainer performed the piece again in 1970 at the Judson's People's Flag Show, and it was revived again for a 1999 performance. In each case, the church fully supported her efforts to expand and challenge current notions of decency and decorum. In 1990 Rainer received a MacArthur fellowship for her contributions to the arts.

Rachel Rosenthal is an acclaimed performance artist who has been honored with numerous awards and fellowships including those from the Rockefeller and Getty Foundations, the National Endowment for the Arts, The United States Information Agency, and the California Arts Council Organization. She has been granted an Honorary Doctorate from the School of the Art Institute of

Chicago for her contributions to performance art. Ms. Rosenthal has used nudity in several works, most recently in her 1996 piece *Timepiece*. The piece, which tied in issues of human victimization with the plunder of the environment, featured three artists, nude, first walking in the background of a dramatic monologue about the Holocaust and then representing the life cycle of trees. The scene's expressive power would have been greatly diminished and its message altered had the artists been clothed. *Timepiece* was performed extensively including at Cal State University Los Angeles; Cantabile 2/Waves Festival, Vordingborg, Denmark; UC Santa Barbara; Harrison Opera House, Norfolk VA; UA Presents, University of Arizona, Tucson; the Dance Center of Columbia College in Chicago; and will be presented this coming October at Evergreen State College, Olympia WA.

Since its inception in 1972 as one of the first live-work art projects in the country, supporting the vision and development of contemporary performing artists has been central to the mission of Theater Artaud. Over the years, the profile of artists who have performed in the venue has been varied, but all were creating new work that was socially vital and that crossed the boundaries of form, discipline, assumption and convention - challenging conventional expectations. Within this artistic context, the use of partial and/or full nudity, as well as the implicit suggestion of nudity, often played a central role. Nationally-acclaimed artists/companies who incorporated the use of nudity into their

performances at Theater Artaud in the past include performance artist Karen Finley and the theater company Contraband.

Theatre Communications Group, the national service organization for the not-for-profit theater in America, currently claims a membership of more than 350 theaters in 44 states. Their mission of strengthening, promoting and nurturing the American theater, leads them to firmly support freedom of expression in the pursuit of art in general and theater in particular. TCG seeks to protect its members' right to the fullest range of free artistic expression, including nudity where required.

The Walker Art Center of Minneapolis, Minnesota, opened in 1927 as a visual arts museum and began presenting the performing arts in the 1940s. The Walker now houses the largest museum-based performing arts department in the country, presenting hundreds of local, national, and international contemporary artists each year. The Walker introduces new artists to the community while maintaining a commitment to contemporary masters. The Walker's Performing Arts Department has been the recipient of numerous awards, including the 1998 Quality of Life Award form the Minneapolis Chamber of Commerce. The Walker presents highly acclaimed artists from a variety of disciplines, including those who sometimes incorporate full or partial nudity as an integral artistic element of their work, such as theater artists the Wooster Group, Ping Chong, and Robert LePage and dance artists

Eiko & Komo, the Bill T. Jones/Arnie Zane Dance Company and Kim Itoh.

As the foregoing demonstrates, amici represent a variety of artists and organizations that have extensive knowledge and experience in the performing arts. Many of the facts asserted in the argument of this brief are drawn from the personal knowledge of amici.

SUMMARY OF ARGUMENT

The Supreme Court of Pennsylvania correctly ruled that the expression involved in this case deserves First Amendment protection under the relevant judgments of this Court, including *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). Clearly such expression falls within none of the narrow categories -- for example, incitement and fighting words -- which the First Amendment allows government to forbid or punish. Neither the entertainment context, nor the commercial setting in which it typically occurs, forfeits that constitutional protection.

Any suggestion that such an ordinance could be justified by treating nude expression as legally obscene would fail under *Miller v. California*, 413 U.S. 15 (1973) since its terms meet few if any of the rigorous conditions this Court has set for approval of obscenity legislation. Indeed, this Court has consistently recognized the presumptively protected status of mere nudity in art and entertainment, *Jenkins v. Georgia*, 418 U.S. 153 (1974), even where such performances may offend substantial parts of a community.

Moreover, the ordinance which the court below invalidated on First Amendment grounds would, by its terms, undoubtedly reach a broad range of recognized artistic expression, also involving nudity, the value of which is beyond dispute. Indeed, nudity plays a vital role in the performing arts, as myriad examples familiar to amici eloquently demonstrate. Whatever may have been the

immediate concern of those who drafted and enacted the challenged ordinance, there can be no doubt that its provisions forbid a substantial amount of recognized and acclaimed artistic endeavor. Such a broad and indiscriminate reach warrants the strictest scrutiny on this Court's part.

While holding in *Barnes* that some such expressive activity may be regulated, this Court imposed several vital conditions, which the Erie ordinance fails to meet. Under *Barnes*, only content-neutral laws may be invoked, and the goals they serve must be unrelated to the suppression of free expression. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 586 (1991) (Souter, J., concurring). Yet Pennsylvania's highest court has ruled that the ordinance challenged here does not meet that test. *Pap's A.M. v. City of Erie*, 719 A.2d 273, 279 (1998). Specifically, the court below found that the ordinance is not content-neutral, but is in fact is clearly content-based, and that among its goals are "an unmentioned purpose that directly impacts on the freedom of expression: . . . to impact negatively on the erotic message of the dance." *Id.*

The court below also correctly ruled that, even if the ordinance were deemed content-neutral and served interests that were unrelated to the suppression of free expression, it is not narrowly tailored. *Id.* at 280. Characterizing the law as "highly circuitous," the court below identified at least one specific and less restrictive alternative that would equally well meet the city's needs. *Id.* Such a construction of state law, by the highest court of the

Commonwealth, places this ordinance in a posture wholly different from that of the local regulation this Court sustained in *Barnes*.

For these reasons, amici respectfully urge the affirmance of the judgment below.

ARGUMENT

I. THE EXPRESSION AT ISSUE IN THIS CASE IS CLEARLY ENTITLED TO FIRST AMENDMENT PROTECTION.

Artistic expression is as fully protected by the First Amendment as other forms of speech, *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989); *see also Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995). The presence of nudity does not diminish that protection. At least since this Court's judgment in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981), it has been clear that nudity does not deprive artistic expression of "First Amendment protections from official regulation." Indeed, that principle had almost certainly been settled several years earlier when, in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 562 (1975) this Court invalidated a city's denial of public space for the performance of a rock musical which, *inter alia*, included on-stage nudity. Other cases of that era also presupposed First Amendment protection for such expression. *See Doran v. Salem*

Inn, Inc., 422 U.S. 922 (1975); *California v. LaRue*, 409 U.S. 109 (1972).

The plurality opinion in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991), did not diminish the protected status of such expression, by declaring that nude expression "of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so." Any doubt on that score should be allayed by Justice Souter's concurring statement: "Thus I agree with the plurality and the dissent that an interest in freely engaging in the nude dancing at issue here is subject to a degree of First Amendment protection." *Id.* at 581. Indeed, when one merges Justice Souter's view with those of the four dissenters, it seems quite clear that a majority of the *Barnes* Court would have granted broader protection than the plurality to nude expression or performances in that context. Suffice it to say, as did the court below, that the *Barnes* Court was unanimous in its view that the regulated expression fell within the scope of First Amendment speech.

The lower court's view of the First Amendment issue was sound for a different if related reason. This Court has consistently ruled that all expression is protected unless it falls within one of several narrow categories -- speech that incites to imminent lawless action, fighting words, obscenity, child pornography, defamation of a private individual, etc. Other kinds of speech that may find little favor in polite company, or may win few encomia from literary

critics -- "indecent" and "patently offensive" material on the Internet, most recently -- is nonetheless protected, *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), if only because there is no constitutionally valid basis on which to deny protection. Indeed, even speech that is unprotected may not be restricted on the basis of an unpopular message or abhorrent viewpoint, *R.A.V. v. St. Paul, Minn.*, 505 U.S. 377 (1992).

Finally, any suggestion that nude performances might be proscribed as legally obscene must fail. The provisions of this law fall far short of the standards on which this Court insisted in *Miller v. California*, 413 U.S. 15 (1973) and later cases. The ordinance contains no requirement that a performance must exceed contemporary community standards in its "predominant appeal to prurient interest" or in its depiction or description "in a patently offensive way [of] sexual conduct specifically defined by the applicable state law," much less that it "lacks serious literary, artistic, political or scientific value." *Miller*, 413 U.S. at 25. To the contrary, this Court has consistently ruled that mere nudity in entertainment may not be equated with obscenity, *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974), or banned to protect the privacy of those who might be offended by such public displays, *Erznoznik v. Jacksonville*, 422 U.S. 205, 210-211 (1975).

The protected status of the type of expression in which respondents engage, and which is clearly forbidden by the challenged ordinance, is the starting point for First Amendment

analysis, but only that. The collateral effects of such a law are in some ways far more egregious.

II. WHERE THE TERMS OF A LAW PROHIBIT A WIDE RANGE OF PROTECTED EXPRESSION, A FACIAL CHALLENGE IS WARRANTED UNDER THE FIRST AMENDMENT.

This Court has consistently ruled that where the terms of a statute or ordinance reach a broad range of protected expression, the speech of others than those who are immediately affected should be considered in assessing the constitutionality of such a law. *Broadrick v. Oklahoma* limits that process to situations where the law specifically proscribes the content of a wide spectrum of protected speech, in ways that no limiting construction confines, and where such breadth inevitably creates a "chilling effect" upon other speakers. 413 U.S. 601, 611-612 (1973).

Under this analysis, the Erie ordinance merits just such scrutiny. While the nature of respondent's proscribed activity may be commercial entertainment, the potential reach of the language of the law is far broader. Here, for example, the definition of a "public place" would unquestionably include a "theater" within which various recognized and acclaimed artistic works might be performed, examples of which are set forth below. City of Erie Ordinance 75-1994. If such works included even momentary "appear[ance] in a state of nudity", the ordinance would by its terms

forbid the entire performance. *See id.* Even under the most narrow interpretation of the ordinance, if the presentees of such an event chose to restrict attendance to "adults or to patrons invited to attend," the event would fall beyond the one clause that might possibly limit the scope of the ordinance. *See id.* Indeed, the very breadth and scope of this ordinance leave to local law enforcement agencies and officers a dangerously wide range of discretion regarding expressive content, within a highly sensitive area of protected speech, *cf. Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123 (1992).

The prospect of such application is hardly fanciful, as the facts of *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), make clear. There a municipal agency refused permission, chiefly because of brief nudity, to perform the Rock Musical *Hair* in a city auditorium -- an act which this Court deemed a clearly impermissible prior restraint of protected speech.

The challenged ordinance poses a wholly comparable threat to a broad range of acclaimed and fully protected artistic expression. Nudity as an expressive tool has a rich history in the American performing arts.[2] It is impossible to pinpoint the moment that nudity became an accepted component in serious artistic works, but there are certainly landmarks. *The Death of Adonis*, which

[2]The role of nudity in European and Asian works would involve a whole separate discussion, perhaps starting with performances of works like Aristophanes's *Frogs* in which it is believed the actors donned caricaturish attachments of oversized genitals, a practice that the Erie ordinance may define

featured pioneering choreographer and dancer Ted Shawn nude except for white body paint and a fig leaf — creating the image of a classic sculpture — was first performed in 1923 at a private reception at New England's Mariarden Art Center. TED SHAWN, ONE THOUSAND AND ONE NIGHT STANDS 146-148 (1979) The private reception was arranged because the organizers feared that general audiences may have found the work obscene. *Id.* The work, however, was a success and Shawn subsequently performed the dance around the country[3] and the world. It was perhaps the first time outside of vaudeville, that a "serious dance artist had ever accepted the challenge then inherent in the combination of nudity with movement." *Id.* at 146.

Dancers and choreographers continued to experiment with nudity into the 1960s, particularly the Judson dance theater movement in New York, of which amicus Yvonne Rainer was a founder. For choreographers such as Rainer, nudity served the purpose of de-eroticizing the body, emphasizing the ordinariness of the anatomy over the intimation of sexuality in the clothed dancer. And contemporary choreographers such as Bill T. Jones utilize nudity both to celebrate the beauty, grace and strength of varying human body types and to illustrate the body's ultimate frailty and

as "nudity."

[3]In February 1924 alone, Shawn and his company, Denishawn, performed in Kansas, Missouri, Oklahoma, Arkansas, Iowa, Illinois and Nebraska. A scheduled Providence, Rhode Island engagement was canceled by the local police commissioner because of the nudity in the troupe's work. TED SHAWN, ONE THOUSAND AND ONE NIGHT STANDS 151-153 (1979).

vulnerability. Camille LeFevre, *Nudity in the Promised Land Causes a Stir*, DANCE, Nov. 1990, at 13. Martha Clarke's *The Garden of Earthly Delights* (1987) used nudity to present a live action depiction of Hieronymous Bosch's painting of the same name. Clarke's *Vers la Flamme* (1999), which is featured this fall in Lincoln Center's "Great Performers" series, contains full frontal nudity. Other acclaimed choreographers and dancers such as Pilobolus, the Paul Taylor Dance Company, Momix, and Pina Bausch commonly utilize nudity in their works.

The advent of nudity in serious professional theater is traced to the 1967 production of Galt MacDermont and James Rado's musical *Hair* (1967) at New York's Public Theater. However, earlier examples may be found. Franco Zefferelli's staging of Shakespeare's *Romeo and Juliet* for the National Theatre of Britain was performed on Broadway in 1964. In it, the star-crossed lovers appear naked in bed. The 1966 Broadway production of Jay Presson Allen's *The Prime of Miss Jean Brodie* (1967) included a scene of a student modeling topless for her art teacher. *Hair* moved to Broadway's Biltmore Theatre where it played until 1972. During that time the New York stage featured a host of other plays containing nudity including Paul Foster's *Tom Paine* (1968) at Stage 73 in 1968, Michael McClure's *The Beard* (1965) in 1969, Tom Eyen's *The Dirtiest Show in Town* (1969) and Kenneth Tynan and Jacques Levy's *Oh! Calcutta!* (1969) both in 1970.

Although the nudity in *Hair* or *Oh! Calcutta!* may have been used for shock value or to symbolize liberation from societal conventions, nudity is an extremely versatile expressive tool capable of communicating the full spectrum of human conditions. And although there are many examples of nudity being used to convey an erotic message, — for example, David Rabe's *Hurlyburly* (1984) *and In The Boom Boom Room* (1972) or the recent Broadway production of David Hare's *The Blue Room* (1998) -- its use is in no way confined to expressing sex and sexuality. In *Angels in America: Millennium Approaches* (1991), for which amicus Tony Kushner won the 1993 Tony Award for Best Play and the Pulitzer Prize for drama, nudity is used in an anti-erotic way, to illustrate the ravages of disease and the characters' physical and emotional vulnerability. The play's second part, *Angels in America: Perestroika* (1993), which won the 1994 Tony Award for Best Play uses nudity to contrast the emotional conditions of other characters.

Margaret Edson's *Wit* (1998), the winner of the 1999 Pulitzer Prize for drama and numerous other awards, traces the decline and ultimate death of a terminally ill woman. The play concludes with the lead character, played off-Broadway by amicus Kathleen Chalfant, succumbing in her struggle with ovarian cancer by shedding her clothes in a blaze of pure, white, blinding light. This resolution of the play, the transcendent moment when physical deterioration and frailty are at last put aside and the spirit is released in freedom, can only be expressed through the use of on-

stage nudity and, according to amicus Chalfant, the playwright has refused performance rights to those who will not use it. *Wit* is one of the top ten plays scheduled for production around the United States in the 1999-2000 season. AMERICAN THEATRE, October 1999, at 68.

Even a nominal exposition of plays that call for nudity comprises an impressive roster of contemporary theater: Tony Award winning Best Plays such as amicus Terrence McNally's *Love! Valour! Compassion!* (1995), Harvey Fierstein's *Torch Song Trilogy* (1983) and Peter Shaffer's *Equus* (1975) ; musicals such as Stephen Sondheim and James Lapine's *Passion* (1994); A. R. Gurney's *Sweet Sue*, (1987) the Broadway production of which starred Mary Tyler Moore and Lynn Redgrave; Caryl Churchill's *Mad Forest* (1990) and *Cloud Nine* (1979); Elizabeth Egloff's *The Swan* (1989); John Guare's *Six Degrees of Separation* (1990); Doug Wright's *Quills* (1996); Craig Lucas's *Missing Persons* (1996); David Edgar's *Pentecost* (1996); Christopher Kyle's *The Monogamist* (1996); Jules Feiffer's *Carnal Knowledge* (1993); Lorraine Hansberry's *Les Blancs* (1970); and David Storey's *The Changing Room* (1973). These plays have been and continue to be performed, with the scripted nudity included, in non-profit and commercial theaters across the country.

Productions containing nudity are found in large cities and small towns, in local and regional companies as well as major ones. The New York stage currently features nudity in Tracy

Letts's *Killer Joe* (1998); David Hare's *Judas Kiss* (1998); David Dillon's *Party* (1992); and the Celebration Theatre's 1999 production of Robert Schrock's *Naked Boys Singing* (1999). Less urban theater audiences had the chance to see nudity in, for example, the Purple Rose Theater Company's (Ann Arbor, Michigan) production of B. Corbett's *The Big Slam* (1999); the premiere of Anita Gabrosek's *Disengaged* (1998) at Ohio University; Heiner Muller's *Hamletmachine* (1977) at Colorado University in 1996; and Charles L. Mee's *Big Love or The Wedding of the Millennium* (University of California-San Diego 1999). These are but a few examples.

Nudity also commonly appears in new interpretations of plays that were not necessarily written to include it. The 1991 production of Richard Alder's *Damn Yankees* (1955) featuring Jerry Lewis contained male nudity in one of its locker room scenes. This version of the play was performed at Broadway's Marquis Theater and traveled throughout the country. The current award-winning Broadway production of Fred Ebb's *Cabaret* (1966) includes live nudity. Two versions of Tennessee Williams's *A Streetcar Named Desire* (1947), a 1997 production by the American Conservatory Theater and a current production at the New York Theater Workshop, have also featured on-stage nudity. The recent Broadway production of Tennessee Williams's *Orpheus Descending* (1957), featuring Vanessa Redgrave, did as well.

Even Shakespeare's plays have been staged to include actors without costumes. Amicus Oregon Shakespeare Festival has produced two versions of *Measure for Measure* that contained nudity, one in 1986 and one in 1977. This past summer, the Ahmanson Theater in Los Angeles, presented a production of *Measure for Measure*, directed by Sir Peter Hall, that did as well. So too did the American Conservatory Theater's 1996 production of *Othello* in San Francisco and the Theatre for New Audiences 1999 production of *Macbeth* in New York.

Many operas also call for nudity in their librettos, Richard Strauss's *Salomé* (1905), and Sergey Prokofiev's *The Fiery Angel* (1954). Also requiring nudity are Camille Erlanger's *Aphrodite* (1905), Carlisle Floyd's *Susannah* (1957), and Hugo Weisgall's *Esther* (1993). Many productions of Giuseppe Verdi's *Rigoletto* (1850) and Richard Wagner's *Die Walküre* (1856) will contain nudity. Other examples include the San Francisco Opera's 1989 production of Arrigo Boito's *Mefistofele* (1868) and 1994 production of Jules Massenet's *Hérodiade* (1881), which starred renowned tenor Placido Domingo, and the Long Beach Opera's 1998 production of Henry Purcell's *The Indian Queen* (1695).

Because the Erie ordinance offers no guidance as to which productions will be considered a threat to the city's public health, safety, and welfare, presenters and performers are left to guess whether they will run afoul of the ordinance if they stage any of the above-mentioned works. By its terms, the ordinance leaves

artists to guess whether their use of nudity will be deemed acceptable by local officials. Those who are fearful of prosecution — likely a significant number especially when the considerable investments most of those works require are at risk — will be inclined to simply forfeit their constitutional right to present this protected artistic expression. That chilling effect is something the First Amendment plainly does not allow.

A telling example of this chilling effect occurred in 1998. The Actor's Theater of Charlotte (North Carolina) had planned a production of Heather McDonald's *Dream of A Common Language*, a play which ironically addresses the very issue of artistic freedom. *Theater Cancels Play with Nudity*, Wilmington Star-News, November 18,1998, at 3B. The play depicts a female artist in the 1890s, a time when women were not permitted to use live nude models. At the conclusion of the play, her husband agrees to model for her and removes his clothes on stage, a plot device that crystallizes the play's message. However, North Carolina's public nudity law makes no exception for artistic performance. *Id.* Despite assurances from local officials that the theater would not be prosecuted under the law, the theater canceled the performance rather than jeopardize its main funding source, the Charlotte-Mecklenburg Arts & Sciences Council. *Id.* The Arts & Sciences Council does not fund organizations that violate local, state or federal laws.

Such examples as these, drawn from a broad spectrum of the performing arts — to all of which the terms of the Erie ordinance unmistakably apply — confirm the need for strict scrutiny. Such a standard is consistent with the rigorous review this Court has applied to comparable laws that restrict or forbid protected expression well beyond the circumstances of the immediate case.

III. TO THE EXTENT RESPONDENT'S EXPRESSION MAY INVOLVE CONDUCT AS WELL AS SPEECH, THE RULING OF THE COURT BELOW WAS CLEARLY SOUND.

Whatever degree of First Amendment protection any nude performance may enjoy, laws that regulate such activity must at the very least meet the criteria announced in *United States v. O'Brien*, 391 U.S. 367 (1968). Thus, even if a law "furthers an important or substantial governmental interest," the goals it serves must be "unrelated to the suppression of free expression," and any "incidental restriction on alleged First Amendment freedoms [must be] . . . no greater than is essential to the furtherance of that interest." *Id.* at 377. As the court below found, the challenged ordinance fails both those parts of the *O'Brien* test, even if furtherance of a substantial governmental interest be established. *See Pap's A.M. v. City of Erie*, et.al., 719 A.2d 273, 278 (1998).

First, a challenged law must be shown to further governmental interests that are "unrelated to the suppression of free expression." *O'Brien*, 391 U.S. at 377. The *Barnes* plurality concluded, as had the lower courts, that such an interest was served. 501 U.S. at 569. In the present case, however, the state's highest court has ruled that the ordinance fails because at least one of its goals does relate to suppression of expression. *City of Erie*, 719 A.2d at 279. Specifically, along with the stated purpose of "combat[ting] negative secondary effects [there is] inextricably bound . . . an unmentioned purpose that directly impacts on the freedom of expression: that purpose is to impact negatively on the erotic message of the dance." *Id.* The Pennsylvania Supreme Court added that, by analogy to this Court's ruling in *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123 (1992), "[s]imilarily, the negative secondary effects associated with nude dancing are inextricably linked to the erotic message of the dance." *City of Erie*, 719 A.2d at 279. Such a clear ruling by a state's highest court sustains, indeed compels, a negative answer to *O'Brien*'s third desideratum -- whether the interests served by the challenged law are "unrelated to the suppression of expression." *O'Brien*, 391 U.S. at 377.

Equally clear is a negative response to *O'Brien*'s fourth question -- whether any "incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of [a valid] interest." *Id.* The fatal flaw in the Erie

ordinance, ruled the Pennsylvania Supreme Court, is the "highly circuitous" path it follows toward an arguably valid municipal interest in deterring "rape, prostitution and other sex crimes" by barring unclad performances by dancers. *City of Erie*, 719 A.2d at 280. The alternative suggested by the court below -- "imposing criminal and civil sanctions on those who commit sex crimes" would beyond doubt provide "a far narrower way of achieving the compelling governmental interest." *Id.* If such an alternative would fully meet a city's needs in regard to the expression involved in the present case, it would even more clearly meet any valid governmental interests that might exist with respect to the acclaimed artistic works that amici have described in the preceding section.

Where, even in theory, less restrictive means exist by which regulatory goals may be met, the First Amendment compels resort to such alternatives, *Boos v. Barry*, 485 U.S. 312, 329 (1988). Where the highest court of a state has found that such an option not only exists in fact, but would in addition be substantially less restrictive of protected expression, the imperative that government prefer such an alternative seems compelling.

The failure of this ordinance to meet either the third or fourth elements of the *O'Brien* test should be dispositive. Where the state's highest court has found that a state or local law neither serves interests unrelated to the suppression of free expression, nor restricts speech to no greater extent than is necessary to serve its stated goals, the invalidity of such a law is beyond dispute.

CONCLUSION

For the foregoing reasons, amici respectfully urge affirmance of the judgment of the court below.

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